

VERMONT LABOR RELATIONS BOARD

In Re:

GRIEVANCE OF DAVID NEWTON

DOCKET NO. 78-848

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On June 21, 1978, the Vermont State Employee's Association filed a grievance with this Board on behalf of David Newton. The grievance alleged that David Newton had been dismissed from his employment with the Vermont Department of Social Welfare without just cause. The State filed its answer with the Board on July 12, 1978. A hearing before the Board was held on October 5 and completed on October 12, 1978. Grievant was represented by Alan S. Rome, Counsel for the V.S.E.A., and the State was represented by Bennett Greene, Assistant Attorney General. Briefs and requests for findings of fact were timely filed with the Board by both parties.

FINDINGS OF FACT

1. David Newton was employed by the Vermont Department of Social Welfare in their Bennington office from July, 1978 to May, 1978. He worked as a general assistance specialist for approximately four years and was then promoted to an income maintenance supervisor. During the time he worked for the Department his performance ratings ranged from "consistently meeting job requirements" (3) to "outstanding" (5) (Grievant's Exhibits 1-5).

2. On December 8, 1976, David Newton applied for an Emergency Fuel Vendor. One of the requirements for acceptance as an Emergency Fuel Vendor client is that the applicant: have exhausted all available income and resources" (Grievant's #12A). On his application David Newton listed as the only available resources owned by himself and family members: \$12.00 in cash on hand and an overdrawn checking account. Mr. Newton certified with his signature that the information on the application was true to the best of his knowledge and belief (Grievant's 16).

3. Prior to Mr. Newton's marriage to his wife Joyce in February 1976, Joyce had started three individual savings accounts for her three children by her first marriage. At the time Mr. Newton applied for the Emergency Fuel Vendor, these accounts totaled approximately \$38.00.

4. Mr. Newton had not been informed by his wife of the existence of these accounts when he applied for the Emergency Fuel Vendor. He had no knowledge of the accounts until approximately six months after his application.

5. Mr. Newton also had \$12.07 in a Montpelier Credit Union Account. According to Social Welfare Regulation #2601, an "available resource" is one which can be converted into cash within 24 hours (Grievant's #10). Since the Credit Union money was in Montpelier and Mr. Newton knew that he could not have access to it within 24 hours, he did not list it as an available resource.

6. On January 5, 1978, David Newton applied to the Department for food stamps (State's Exhibit B). At the time of his

application his wife had not returned to her job as an LPN with the Putnam Hospital because their baby who was born in the Fall of 1977 had been very ill. Mr. Newton made his application through Sharon Gibbs, his immediate supervisor. He told Ms. Gibbs that his wife would probably be returning to work sometime in February. Since Mr. Newton would no longer be eligible for food stamps once his wife returned to work, he was put on "short term closure" which meant that his eligibility would automatically be terminated in March, 1978.

7. The Social Welfare Assistance Regulations on Eligibility for Food Stamps (Regulation #2131.21) requires food stamp recipients to report any change in income within 10 days of the occurrence of that change. When a reported change requires a termination of Food Stamp benefits, advance notice of the termination must be given to the recipient within 10 days. Recipient's food stamps are not terminated until the first issuance following the expiration of that 10-day advance notice period (Grievant's Exhibit #11).

8. Joyce Newton returned to work at the Putnam Memorial Hospital on January 19, 1978 (State's Exhibit "A").

9. There is conflicting evidence as to whether David Newton or Joyce Newton informed Sharon Gibbs of Joyce's return to work. In any event, David Newton did not receive the required notice from the Department that his food stamps would be terminated. He received and kept both the February and the March issuances of stamps.

10. On May 19, 1978, Commissioner David M. Wilson dismissed Mr. Newton from his position as Income Maintenance Specialist for

the following two reasons:

a) Non-disclosure of a savings account, when applying for an Emergency Fuel Vendor, in December, 1978, and

b) Non-disclosure of his wife's return to work while he was receiving food stamps.
(Grievant's Exhibit #6)

11. On June 9, 1978, Commissioner Wilson in response to a request by Mr. Newton to reconsider, refused to reverse his decision (Grievant's #8 & 9).

12. As a result of his 5-year employment as a general assistant specialist and an income maintenance supervisor with the Department of Social Welfare, Mr. Newton was extremely knowledgeable concerning the Department's rules and regulations for General Assistant programs including those which pertain to eligibility for the Food Stamp and the Fuel Vendor programs.

OPINION

The issue presented to the Board in this case is whether Commissioner Wilson, as Grievant's appointing authority, had "just cause" for dismissing the Grievant. Article XIII(1) of the Agreement between the State of Vermont and the Vermont State Employees' Association for the Management Unit, provides that:

"The appointing authority or his authorized representative may dismiss an employee for just cause. Notice of dismissal must be in writing."

Article XIII(2) further provides that the employer "must state the reason or reasons for the dismissal" in the dismissal notice. While Grievant was given two reasons for his dismissal, we interpret the wording of the Agreement to mean that one reason alone would be sufficient. In making this determination we have not

considered or given any weight to the affidavit from Commissioner Wilson which Attorney Greene included with his Request for Findings. We do not approve of attempts to influence the Board by submitting evidentiary documents subsequent to the closing of evidence. There are appropriate motions for bringing newly discovered evidence to the attention of the Board. We strongly suggest that these procedures be used in the future, and that inappropriate actions such as this one not be allowed to reoccur.

As to Commissioner Wilson's first reason for Grievant's dismissal, we find no evidence to show that Grievant intentionally deceived the Department as to the amount of his family's available resources. To the best of his knowledge and belief what David Newton stated on his application was true. He cannot be held responsible for not disclosing savings accounts for his step-children which were established by his wife before his marriage to her and of which he had no knowledge until six months after he had received his grant from the Emergency Fuel Vendor. Nor does him money in the Montpelier Credit Union fall within the definition of an "available resource" since it would have taken more than 24 hours to transfer that money from Montpelier to Bennington. We, therefore, find the first charge unsubstantiated by the evidence.

We do, however, find that there is sufficient evidence to substantiate the second reason. The evidence as to whether the Grievant disclosed to Ms. Gibbs the fact that his wife had returned to work on January 19 is conflicting. It is his word against that of Ms. Gibbs. It is not necessary for our decision to resolve this conflict. The fact remains that while Grievant

may still have been eligible for the February issuance of food stamps, he was not eligible for the issuance in March.

Even if we take the evidence in the light most favorable to the Grievant and accept as true his statement that he told Ms. Gibbs of his wife's return to work within 10 days or shortly thereafter, Grievant still knew that he could only have received the March food stamps through a technical mistake on the part of Ms. Gibbs in failing to give the required 10-day notice that his food stamps had been terminated. He, therefore, accepted and kept the stamps with full knowledge that a mistake had been made and that he would not have been entitled to them otherwise.

If this was the case of an ordinary applicant for food stamps who, having given the appropriate notice of a change in his family's income, received a benefit through the Department's mistake in not properly terminating the benefit, the applicant would have been legally entitled in a technical sense to accept the benefit. However, this is not the case of an ordinary applicant. Grievant had worked for five years for the Department and had an insider's special knowledge of the rules and regulations pertaining to eligibility for food stamp and other general assistance benefits. He dealt with applicants on a day-to-day basis who had resources which were far less than his own. As an employee of the State in a sensitive agency he was responsible for ensuring that the money allocated for general assistance programs was properly distributed to individuals who met the eligibility requirements.

His inside knowledge of the regulations and his position within the Department placed him in a special position of trust when he, himself, became an applicant for the same benefits which he was also responsible for distributing. His relationship to the

State then became similar to the special fiduciary relationship between a director-shareholder and his corporation:

"(It) binds him to use the utmost good faith and loyalty for the furtherance and advancement of the interest of that corporation. He is not permitted to make profit for himself in the transaction of the business of the corporation, against its interest." Lash v. Lash Furniture Co. of Barre, Inc., 130 Vt 517 at 522, 296 A.2d 207 (1972).

In the interest of proper distribution of public funds for the purpose of assisting needy individuals, Grievant, as a distributor of these funds, had a duty to his employer to return the benefits which he knew he had received through an administrative mistake. His failure to do so cannot be judged by the same standard which would be applied to an ordinary applicant. In applying the standard of good faith and loyalty which he owed the Department and the State, his failure to return the stamps can only be viewed as an attempt to make a profit for himself in transacting the State's business against its interests.

We do not decide whether there is any legal violation on part of Grievant which might have criminal implications. The issue before us is whether the State had "just cause" to dismiss Grievant. The Vermont Supreme Court has held that a discharge "for cause" can be upheld if it meets two criteria of reasonableness:

"one that it is reasonable to discharge employees because of certain conduct, and the other, that the employee had fair notice, express or fairly implied, that such conduct would be ground for discharge."
In Re Albert Brooks (Vt. Supreme Court, October Term, 1977)

Given the standard of good faith and loyalty to his employer, we find that it was reasonable for the State to discharge Grievant for conduct which violated that standard. Furthermore, we find that as an employee responsible for enforcing regulations, Grievant had "fairly implied notice" that the use of a regulation

for his own benefit against the interests of the State would be cause for dismissal.

ORDER

In accordance with the reasons discussed above, we hereby ORDER the grievance of David Newton dismissed and it is DISMISSED.

Dated this 16th day of November, 1978 at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney
Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.
William G. Kemsley, Sr.

Robert H. Brown
Robert H. Brown